



[Notice 2023-05]

Memorandum of Understanding Regarding the Enforcement of Federal Campaign

Finance Laws

AGENCY: Federal Election Commission (FEC), Department of Justice (DOJ).

ACTION: Notification of Memorandum of Understanding (MOU).

SUMMARY: The purpose of the below MOU is to promote the enforcement of the Federal campaign finance laws and to establish guidelines for the FEC and the DOJ to engage in parallel proceedings, share information in appropriate circumstances, and otherwise properly advance the missions of both agencies subject to all relevant legal and ethical constraints informed by mutual respect of the independence of each agency.

DATES: The MOU is effective [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Charles Kitcher, Associate General Counsel for Enforcement, Office of General Counsel, Federal Election Commission, 1050 First Street, NE., Washington, DC 20463, (202) 694-1650 or (800) 424-9530; Robert J. Heberle, Director, Election Crimes Branch, Public Integrity Section, Criminal Division, U.S. Department of Justice, 1301 New York Ave. NW., Washington, DC 20530, (202) 514-1412.

SUPPLEMENTARY INFORMATION: The text of the Memorandum of Understanding is as follows:

MEMORANDUM OF UNDERSTANDING

**BETWEEN THE FEDERAL ELECTION COMMISSION AND
THE UNITED STATES DEPARTMENT OF JUSTICE REGARDING
ENFORCEMENT OF THE FEDERAL CAMPAIGN FINANCE LAWS**

Purpose

1. This Memorandum of Understanding (“MOU”) sets forth an agreement between the Federal Election Commission (“Commission”) and the United States Department of Justice (“Department”) concerning their respective enforcement responsibilities under the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. 30101-45, the Presidential Election Campaign Fund Act, 26 U.S.C. 9001-12, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031-42 (collectively, the “Acts”).

2. The purpose of this MOU is to promote the enforcement of the Federal campaign finance laws and to establish guidelines for the Commission and the Department to engage in parallel proceedings, share information in appropriate circumstances, and otherwise properly advance the missions of both agencies subject to all relevant legal and ethical constraints informed by mutual respect of the independence of each agency.

Authority

3. The Commission has exclusive jurisdiction over civil enforcement of the Acts. 52 U.S.C. 30106(b)(1), 30107(e). The Commission’s civil enforcement authority extends to knowing and willful violations. *Id.* 30109(a)(5)(B), (C). The Commission also administers the Acts and formulates policy with respect to the Acts, including issuing formal interpretations of the Acts and promulgating regulations to implement and clarify the Acts. 52 U.S.C. 30106(b)(1); 26 U.S.C. 9009, 9039. The Commission may initiate civil enforcement proceedings without a referral to or from the Department.

4. The Department has exclusive jurisdiction over criminal enforcement of

the federal campaign finance laws. *See generally* 28 U.S.C. 516 (reserving to the Department the conduct of all litigation in which the United States, an agency, or officer thereof is a party “[e]xcept as otherwise authorized by law”). The Department also has jurisdiction over related criminal offenses including, but not limited to: conspiracy in violation of 18 U.S.C. 371; making false statements within the jurisdiction of a federal agency in violation of 18 U.S.C. 1001; obstruction of agency proceedings in violation of 18 U.S.C. 1505 & 1519; and perjury in violation of 18 U.S.C. 1621. The Department may initiate criminal investigations and prosecutions without a referral to or from the Commission.

Civil and Criminal Enforcement

Cooperation and Information Sharing Generally

5. The Department and the Commission agree to assist each other in fulfilling their respective statutory responsibilities and to cooperate, consistent with all legal restrictions, to further their respective enforcement activities.
6. The Commission may share information with the Department, which is an appropriate law enforcement agency, regarding any Commission enforcement proceeding at any point in that process, either upon written request of the Department specifying the information sought or when, in the absence of such request, the Commission concludes that sharing such information is appropriate and consistent with paragraph 2 of this MOU. *See* 52 U.S.C. 30107(a)(9). In addition, as set forth in 52 U.S.C. 30109(a)(5)(C), if the Commission, by 4 affirmative votes, determines that there is probable cause to believe that a knowing and willful violation of the Acts has occurred or is about to occur, it may refer such apparent violation to the Department without regard to any limitations set forth in 52 U.S.C. 30109(a)(4)(A).

7. The Department may share with the Commission information obtained during a criminal investigation or prosecution relating to possible violations of the Acts when appropriate and consistent with applicable law, the integrity of the investigation or prosecution, and paragraph 2 of this MOU. To enable such sharing, the Department may, where appropriate, redact materials that otherwise may not be disclosed. Where the alleged violation warrants the impaneling of a grand jury, information regarding the grand jury investigation will not be disclosed to the Commission, pursuant to Federal Rule of Criminal Procedure 6(e), absent court authorization to provide material to the Commission preliminary to or in connection with a judicial proceeding under Federal Rule of Criminal Procedure 6(e)(3)(E)(i). Further, consistent with the obligations in this paragraph and paragraph 5, if the Department concludes that it will not pursue criminal prosecution of a matter that may involve a violation of the Acts, the Department may apprise the Commission of the matter so that the Commission may consider any further action that may be appropriate under the circumstances.

8. When appropriate, and upon request of the Department, the Commission may make Commission staff available to provide information and to testify in federal criminal proceedings, provided, however, that the Department shall not offer Commission staff as expert witnesses without prior permission from the Commission. It is the understanding of the Department and the Commission that absent exceptional circumstances, Commission staff witnesses will not testify as expert witnesses.

Parallel Proceedings and Investigations

9. The Department and the Commission may engage in parallel proceedings—that is, concurrent investigations or administrative proceedings related to

the same parties or conduct. The Department and the Commission may confer in such instances where appropriate and consistent with paragraph 2 of this MOU, subject to any applicable legal restrictions. While the Department and the Commission may engage in parallel proceedings and share information where appropriate, the Department and the Commission do not intend to engage in joint fact-gathering, joint investigation or litigation strategy, or joint charging determinations. For purposes of criminal litigation, the Department does not consider the Commission to be a part of the prosecution team or to be acting on behalf of the prosecution in any case.

10. The Department may ask the Commission to hold in abeyance an administrative Commission enforcement matter during a parallel criminal investigation. The Commission will consider any such written request and may agree to abate designated Commission enforcement proceedings for an appropriate period of time when deemed appropriate by the Commission. The Department recognizes that periods of abatement of Commission enforcement proceedings have the potential to adversely affect the Commission's interests in such matters. Accordingly, in such instances the Department shall assist the Commission in furthering its independent mission within applicable limitations periods by providing the Commission with information it collects during the course of its criminal investigation relating to an abated matter or matters, subject to any applicable legal prohibitions and handling requirements, at the earliest reasonable opportunity, consistent with the integrity of the criminal investigation and any resulting prosecution. During an abatement, the Department and the Commission will confer as necessary and appropriate in order to keep the Commission apprised about the ongoing need for the abatement, including whether the abatement can be concluded or whether the Department requests that it be maintained.

11. The Department recognizes that open Commission enforcement matters are subject to the requirements of 52 U.S.C. 30109(a)(12)(A), which provides that any notification or investigation made under 52 U.S.C. 30109 shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made. In addition, 52 U.S.C. 30109(a)(4)(B)(i) provides that no action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under 52 U.S.C. 30109(a)(4)(A) may be made public by the Commission without the written consent of the respondent and the Commission. Unlike 52 U.S.C. 30109(a)(12)(A), the application of 52 U.S.C. 30109(a)(4)(B)(i) remains in effect even after the Commission closes a matter and makes it public. The Department will establish and maintain necessary and appropriate safeguards to protect information provided by the Commission falling within the scope of information that shall not be made public in accordance with this paragraph. The Commission recognizes that the Department has obligations under *Brady v. Maryland*, 373 U.S. 83 (1963); the Jencks Act, 18 U.S.C. 3500; and Federal Rule of Criminal Procedure 16 that may require it to provide information about an open Commission matter in conjunction with a criminal matter. Prior to revealing in open court or publicly available court filings, or providing to any person outside of the Department, any information protected by 52 U.S.C. 30109(a)(12)(A) as described in this paragraph, the Department will call to the court's attention any potential conflict between the Department's obligations under *Brady v. Maryland*, the Jencks Act, and Federal Rule of Criminal Procedure 16 and the requirement under 52 U.S.C. 30109(a)(12)(A) that open Commission enforcement matters not be made public. Any pleadings containing information protected by 52 U.S.C. 30109(a)(12)(A) shall be filed by the Department under seal, unless otherwise directed by the court. To any extent that the Department must transmit material protected

by 52 U.S.C. 30109(a)(12)(A) outside the Department in connection with a criminal matter, it will seek to maintain the non-public nature of such information by seeking protective orders or other comparable measures.

12. Unless prohibited by law, the Department and the Commission will each endeavor to notify the other, in writing, of any legally enforceable demand or request made through a subpoena or court order for nonpublic information or documents in the possession of one agency but created by the other. If the request is made pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. 552, or is subject to the Privacy Act, 5 U.S.C. 552a, the Department and the Commission will endeavor to refer the records to the agency that created the documents or consult with that agency before releasing its documents, as appropriate. The Department and the Commission also agree to assert all applicable FOIA or Privacy Act exemptions, litigation privileges, and any other applicable privileges on behalf of the other agency to the extent permitted by law.

13. If a matter pending before the Commission involves a finding by the Commission under 52 U.S.C. 30109(a)(2) that there is reason to believe there has been a knowing and willful violation of the Federal Election Campaign Act of 1971, as amended, exceeding the monetary thresholds for criminal enforcement, *see* 52 U.S.C. 30109(d)(1), the Commission will consider whether the matter also raises possible criminal violations outside of the Commission’s jurisdiction, such as those identified in paragraph 4 above, that should be reported to the Department pursuant to 52 U.S.C. 30107(a)(9). In cases in which the Commission determines that such reporting is appropriate, it will promptly inform the Department of the existence of the Commission’s matter or matters, inform the Department that the Commission has made a reason to believe finding covered by this paragraph, and also report the existence of the possible

criminal violations. Following receipt of such notice, and consistent with paragraph 6, above, the Department may request that the Commission provide the Department information it has collected relating to such matter, subject to any applicable legal prohibitions, at the earliest reasonable opportunity. The Commission and the Department mutually recognize that all violations of the Acts, even those committed knowingly and willfully, may not be proper subjects for prosecution as criminal offenses. For the most beneficial and effective enforcement of the Acts, those knowing and willful violations which are significant and substantial, and which may be described as aggravated in the intent in which they were committed, or in the monetary amount involved should be referred by the Commission to the Department for criminal prosecution review. Within this framework, numerous factors will frequently affect the Commission's determination to share information with the Department or make a report or referral, including the repetitive nature of the acts, the existence of a practice or pattern, prior notice, and the extent of the conduct in terms of geographic area, persons, and monetary amounts, among many other proper considerations.

14. If the Department publicly charges a violation of the Acts, or a conspiracy to violate the Acts, or another crime relating to the Commission such as making a false statement to the Commission, in any court, it shall promptly alert the Commission of the pendency of the matter. Following receipt of such notice, and consistent with paragraph 7, above, the Commission may request that the Department provide information about the matter obtained during the Department's criminal investigation or prosecution.

Related Offenses

15. Materially false information, records, or statements that are intentionally made or submitted to the Commission may constitute violations of federal criminal law

under 18 U.S.C. 371, 1001, 1505, 1519, 1621, and other statutes. If the Commission receives or develops information related to the making or submission of materially false information, records, or statements in a matter within the Commission's jurisdiction through a Commission function, administrative proceeding, investigation, or otherwise, the Commission may report such apparent violations to the Department pursuant to 52 U.S.C. 30107(a)(9), including as set forth above in paragraphs 6 and 2. In the case of such reporting, the Department will evaluate and, in its discretion, prosecute potential criminal offenses arising from that conduct. In the event that the Department requests additional information in furtherance of any such criminal investigation or prosecution by the Department, it may request that the Commission provide such information, consistent with and as set forth above in paragraph 6.

Settlements and Dispositions

16. The Department and the Commission recognize the benefits of global settlements, that is, settlements that simultaneously resolve related criminal and civil violations of the Acts concerning the same underlying unlawful conduct, and may seek to enter into global settlements when appropriate under procedures consistent with the interests and ethical obligations of the Department and the Commission.

17. If a subject or defendant in a criminal investigation or prosecution requests a global settlement, the Department and the Commission may confer as appropriate to determine whether criminal and civil liability arising from the same or related transactions can be resolved in a global settlement.

18. In cases in which no global settlement is reached, the Department will seek to include in any plea agreement concerning conduct that may constitute a violation

of the Acts a provision acknowledging that nothing in the agreement waives or limits in any way the Commission's authority to seek civil penalties or other administrative remedies for violations of the Acts. The Commission and the Department agree, however, that the absence of any such disclaimer in a plea agreement is not intended to constitute a waiver of, or otherwise limit the Commission's ability to engage in, any civil enforcement activity concerning an applicable violation of the Acts.

Points of Contact

19. The Chief of the Public Integrity Section, the Principal Deputy Chief of the Public Integrity Section, and the Director and the Deputy Director of the Election Crimes Branch of the Public Integrity Section, all of the Criminal Division of the Department, shall be the Commission's points of contact for the Department's obligations under this MOU, with the Director of the Election Crimes Branch being the primary contact.

20. The General Counsel for the Commission, the Associate General Counsel and the Deputy Associate General Counsels for Enforcement, and the Associate General Counsel for Litigation in the Office of General Counsel shall be the Department's points of contact for the Commission's obligations under this MOU, with the Associate General Counsel for Enforcement being the primary contact.

Repeal of 1977 Memorandum

21. This MOU repeals and supersedes the 1977 Memorandum of Understanding between the Commission and the Department regarding the handling of violations of the federal campaign finance laws.

Effective Date

22. The effective date of this MOU will be the date the executed MOU is published in the *Federal Register*.

Limitation; No Reliance

23. This MOU applies only to the relationship between the Commission and the Department. It is not intended to confer, nor does it confer, any procedural or substantive rights on any person in any matter before the Department, the Commission, or any court or agency and may not be relied upon for that purpose, or any other purpose, by any person not a party to this MOU.

Dated: April 14, 2023

For the United States Department of Justice.

**Kenneth A. Polite, Jr.,
Assistant Attorney General, Criminal Division.**

Dated: April 19, 2023

For the Federal Election Commission.

**Lisa J. Stevenson,
Acting General Counsel.**

Dated: April 19, 2023.

On behalf of the Commission,

Dara Lindenbaum,

Chair,

Federal Election Commission.

BILLING CODE: 6715-01-P

[FR Doc. 2023-08639 Filed: 4/24/2023 8:45 am; Publication Date: 4/25/2023]